



BUSINESS LAW SECTION

THE STATE BAR OF CALIFORNIA

BLS – 2005 - 07

TO: Larry Doyle, Chief Legislative Counsel, State Bar of California

FROM: Business Law Section-Corporations Committee
Business Law Section-Nonprofit and Unincorporated Organizations Committee
Partnerships and Limited Liability Companies Committee
Jerome A. Grossman, Vice Chair-Legislation--Executive Committee

DATE: July 28, 2004

RE: Tax Clearances: Proposed Amendment to Section 1107.5 of the California Corporations Code and Proposed Adoption of Sections 6020.5, 8020.5, 12550.5, 15678.10, 16915.5 and 17554.5 of the California Corporations Code.

SECTION ACTION AND CONTACTS

Section: Business Law Section
Committees: Corporations Committee
Nonprofit and Unincorporated Organizations Committee
Partnerships and Limited Liability Companies Committee

Dates of Approval:

Section Executive Committee -June 18, 2004
Corporations Committee – May 15, 2004
Nonprofit and Unincorporated Organizations
Committee - May 2004
Partnerships and Limited Liability
Companies Committee – May 13, 2004

Approval Vote:

Section Executive Committee:	For: 12 Against: 0
Corporations Committee:	For: 13 Against: 0
Nonprofit and Unincorporated Organizations Committee:	Without opposition
Partnerships and Limited Liability Companies Committee	For: 4 Against: 0

Permanent Contacts:

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Nonprofit and Unincorporated Organizations Committee:	R. Bradbury Clark O'Melveny & Myers LLP 400 S. Hope St. Los Angeles, CA 90071 Phone: (213) 430-6000 Email: bclark@omm.com
Partnerships and Limited Liability Companies Committee:	David A. Marion Hoge, Fenton, Jones & Appel, Inc. 60 S. Market St., Suite 1400 San Jose, CA 95113 Phone: (408) 287-9501 Email: dam@hoge-fenton.com

The Business Law Section proposes the following amendments to the California Corporations Code:

1. The amendment of Section 1107.5 to read in full as follows:

1107.5. (a) Upon merger pursuant to this chapter, a domestic or foreign surviving corporation or other business entity shall ~~assume~~ be subject to the liability of a domestic or foreign disappearing corporation or other business entity which is taxed under the Bank and Corporation Tax Law (1) to prepare and file, or to cause to be prepared and filed, tax and information returns otherwise required of the domestic that disappearing corporation party under the Bank and Corporation Tax Law (Chapter 10.5 (commencing with Section 17935) of Part 10 of Division 2 of the Revenue and Taxation Code as to a disappearing domestic or foreign limited partnership, Chapter 10.6 (commencing with Section 17941) of Part 10 of Division 2 of the Revenue and Taxation Code as to a disappearing domestic or foreign limited liability company, Chapter 10.7 (commencing with Section 17948) of Part 10 of Division 2 of the Revenue and Taxation Code as to a disappearing registered or foreign limited liability partnership, and Part 11 (commencing with Section 23001) of Division 2 of the Revenue and Taxation Code as to a disappearing domestic or foreign corporation) and (2) to pay any tax liability determined to be due.

(b) Notwithstanding Sections 1103, 1108, 1110, 1113, 6014, 6018, 6019.1, 8014, 8018, 8019.1, 12535, 12539, 12540.1, 15678.4 and 4440 17552 of this code and Sections 17945, 17948.1 and 23334 of the Revenue and Taxation Code, if the surviving ~~corporation~~ entity is a domestic limited liability company, corporation or registered limited liability partnership, or a foreign limited liability company, limited liability partnership or corporation which is registered or qualified to do business in California, the Secretary of State shall file the merger without the certificate of satisfaction of the Franchise Tax Board and shall notify the Franchise Tax Board of the merger.

2. The adoption of new Section 6020.5, to read in full as follows:

6020.5. (a) Upon merger pursuant to this chapter, a domestic or foreign surviving corporation or other business entity shall be subject to the liability of each domestic or foreign disappearing corporation or other business entity which is taxed under the Bank and Corporation Tax Law (1) to prepare and file, or to cause to be prepared and filed, tax and information returns otherwise required of that disappearing party under the Bank and Corporation Tax Law (Chapter 10.5 (commencing with Section 17935) of Part 10 of Division 2 of the Revenue and Taxation Code as to a disappearing domestic or foreign limited partnership, Chapter 10.6

(commencing with Section 17941) of Part 10 of Division 2 of the Revenue and Taxation Code as to a disappearing domestic or foreign limited liability company, Chapter 10.7 (commencing with Section 17948) of Part 10 of Division 2 of the Revenue and Taxation Code as to a disappearing registered or foreign limited liability partnership, and Part 11 (commencing with Section 23001) of Division 2 of the Revenue and Taxation Code as to a disappearing domestic or foreign corporation) and (2) to pay any tax liability determined to be due.

(b) Notwithstanding Sections 1103, 1108, 1110, 1113, 6014, 6018, 6019.1, 8014, 8018, 8019.1, 12535, 12539, 12540.1, 15678.4 and 17552 of this code and Sections 17945, 17948.1 and 23334 of the Revenue and Taxation Code, if the surviving entity is a domestic limited liability company, corporation or registered limited liability partnership, or a foreign limited liability company, limited liability partnership or corporation which is registered or qualified to do business in California, the Secretary of State shall file the merger without the certificate of satisfaction of the Franchise Tax Board and shall notify the Franchise Tax Board of the merger.

3. The adoption of new Section 8020.5, to read in full as follows:

8020.5. (a) Upon merger pursuant to this chapter, a domestic or foreign surviving corporation or other business entity shall be subject to the liability of each domestic or foreign disappearing corporation or other business entity which is taxed under the Bank and Corporation Tax Law (1) to prepare and file, or to cause to be prepared and filed, tax and information returns otherwise required of that disappearing party under the Bank and Corporation Tax Law (Chapter 10.5 (commencing with Section 17935) of Part 10 of Division 2 of the Revenue and Taxation Code as to a disappearing domestic or foreign limited partnership, Chapter 10.6 (commencing with Section 17941) of Part 10 of Division 2 of the Revenue and Taxation Code as to a disappearing domestic or foreign limited liability company, Chapter 10.7 (commencing with Section 17948) of Part 10 of Division 2 of the Revenue and Taxation Code as to a disappearing registered or foreign limited liability partnership, and Part 11 (commencing with Section 23001) of Division 2 of the Revenue and Taxation Code as to a disappearing domestic or foreign corporation) and (2) to pay any tax liability determined to be due.

(b) Notwithstanding Sections 1103, 1108, 1110, 1113, 6014, 6018, 6019.1, 8014, 8018, 8019.1, 12535, 12539, 12540.1, 15678.4 and 17552 of this code and Sections 17945, 17948.1 and 23334 of the Revenue and Taxation Code, if the surviving entity is a domestic limited liability company, corporation or registered limited liability partnership, or a foreign limited liability company, limited liability partnership or corporation which is registered or qualified to do business in California,

the Secretary of State shall file the merger without the certificate of satisfaction of the Franchise Tax Board and shall notify the Franchise Tax Board of the merger.

4. The adoption of new Section 12550.5, to read in full as follows:

12550.5. (a) Upon merger pursuant to this chapter, a domestic or foreign surviving corporation or other business entity shall be subject to the liability of each domestic or foreign disappearing corporation or other business entity which is taxed under the Bank and Corporation Tax Law (1) to prepare and file, or to cause to be prepared and filed, tax and information returns otherwise required of that disappearing party under the Bank and Corporation Tax Law (Chapter 10.5 (commencing with Section 17935) of Part 10 of Division 2 of the Revenue and Taxation Code as to a disappearing domestic or foreign limited partnership, Chapter 10.6 (commencing with Section 17941) of Part 10 of Division 2 of the Revenue and Taxation Code as to a disappearing domestic or foreign limited liability company, Chapter 10.7 (commencing with Section 17948) of Part 10 of Division 2 of the Revenue and Taxation Code as to a disappearing registered or foreign limited liability partnership, and Part 11 (commencing with Section 23001) of Division 2 of the Revenue and Taxation Code as to a disappearing domestic or foreign corporation) and (2) to pay any tax liability determined to be due.

(b) Notwithstanding Sections 1103, 1108, 1110, 1113, 6014, 6018, 6019.1, 8014, 8018, 8019.1, 12535, 12539, 12540.1, 15678.4 and 17552 of this code and Sections 17945, 17948.1 and 23334 of the Revenue and Taxation Code, if the surviving entity is a domestic limited liability company, corporation or registered limited liability partnership, or a foreign limited liability company, limited liability partnership or corporation which is registered or qualified to do business in California, the Secretary of State shall file the merger without the certificate of satisfaction of the Franchise Tax Board and shall notify the Franchise Tax Board of the merger.

5. The adoption of new Section 15678.10, to read in full as follows:

15678.10. (a) Upon merger pursuant to this article, a surviving limited partnership or other business entity shall be subject to the liability of each disappearing limited partnership or other business entity which is taxed under the Bank and Corporation Tax Law (1) to prepare and file, or to cause to be prepared and filed, tax and information returns otherwise required of that disappearing party under the Bank and Corporation Tax Law (Chapter 10.5 (commencing with Section 17935) of Part 10 of Division 2 of the Revenue and Taxation Code as to a disappearing domestic or foreign limited partnership, Chapter 10.6 (commencing with Section 17941) of Part 10 of Division 2 of the Revenue and Taxation Code

as to a disappearing domestic or foreign limited liability company, Chapter 10.7 (commencing with Section 17948) of Part 10 of Division 2 of the Revenue and Taxation Code as to a disappearing registered or foreign limited liability partnership, and Part 11 (commencing with Section 23001) of Division 2 of the Revenue and Taxation Code as to a disappearing domestic or foreign corporation) and (2) to pay any tax liability determined to be due.

(b) Notwithstanding Sections 1103, 1108, 1110, 1113, 6014, 6018, 6019.1, 8014, 8018, 8019.1, 12535, 12539, 12540.1, 15678.4 and 17552 of this code and Sections 17945, 17948.1 and 23334 of the Revenue and Taxation Code, if the surviving entity is a domestic limited liability company, corporation or registered limited liability partnership, or a foreign limited liability company, limited liability partnership or corporation which is registered or qualified to do business in California, the Secretary of State shall file the merger without the certificate of satisfaction of the Franchise Tax Board and shall notify the Franchise Tax Board of the merger.

6. The adoption of new Section 16915.5, to read in full as follows:

16915.5. (a) Upon merger pursuant to this article, a surviving partnership or other business entity shall be subject to the liability of each disappearing partnership or other business entity which is taxed under the Bank and Corporation Tax Law (1) to prepare and file, or to cause to be prepared and filed, tax and information returns otherwise required of that disappearing party under the Bank and Corporation Tax Law (Chapter 10.5 (commencing with Section 17935) of Part 10 of Division 2 of the Revenue and Taxation Code as to a disappearing domestic or foreign limited partnership, Chapter 10.6 (commencing with Section 17941) of Part 10 of Division 2 of the Revenue and Taxation Code as to a disappearing domestic or foreign limited liability company, Chapter 10.7 (commencing with Section 17948) of Part 10 of Division 2 of the Revenue and Taxation Code as to a disappearing registered or foreign limited liability partnership, and Part 11 (commencing with Section 23001) of Division 2 of the Revenue and Taxation Code as to a disappearing domestic or foreign corporation) and (2) to pay any tax liability determined to be due.

(b) Notwithstanding Sections 1103, 1108, 1110, 1113, 6014, 6018, 6019.1, 8014, 8018, 8019.1, 12535, 12539, 12540.1, 15678.4 and 17552 of this code and Sections 17945, 17948.1 and 23334 of the Revenue and Taxation Code, if the surviving entity is a domestic limited liability company, corporation or registered limited liability partnership, or a foreign limited liability company, limited liability partnership or corporation which is registered or qualified to do business in California, the Secretary of State shall file the merger without the certificate of

satisfaction of the Franchise Tax Board and shall notify the Franchise Tax Board of the merger. .

7. The adoption of new Section 17554.5, to read in full as follows:

17554.5. (a) Upon merger pursuant to this article, a surviving limited liability company or other business entity shall be subject to the liability of each disappearing limited liability company or other business entity which is taxed under the Bank and Corporation Tax Law (1) to prepare and file, or to cause to be prepared and filed, tax and information returns otherwise required of that disappearing party under the Bank and Corporation Tax Law (Chapter 10.5 (commencing with Section 17935) of Part 10 of Division 2 of the Revenue and Taxation Code as to a disappearing domestic or foreign limited partnership, Chapter 10.6 (commencing with Section 17941) of Part 10 of Division 2 of the Revenue and Taxation Code as to a disappearing domestic or foreign limited liability company, Chapter 10.7 (commencing with Section 17948) of Part 10 of Division 2 of the Revenue and Taxation Code as to a disappearing registered or foreign limited liability partnership, and Part 11 (commencing with Section 23001) of Division 2 of the Revenue and Taxation Code as to a disappearing domestic or foreign corporation) and (2) to pay any tax liability determined to be due.

(b) Notwithstanding Sections 1103, 1108, 1110, 1113, 6014, 6018, 6019.1, 8014, 8018, 8019.1, 12535, 12539, 12540.1, 15678.4 and 17552 of this code and Sections 17945, 17948.1 and 23334 of the Revenue and Taxation Code, if the surviving entity is a domestic limited liability company, corporation or registered limited liability partnership, or a foreign limited liability company, limited liability partnership or corporation which is registered or qualified to do business in California, the Secretary of State shall file the merger without the certificate of satisfaction of the Franchise Tax Board and shall notify the Franchise Tax Board of the merger.

HISTORY, DIGEST AND PURPOSE:

Prior to January 1, 1991, when the law was amended to authorize limited partnerships to merge with other limited partnerships, the California statutes authorized only mergers of corporations. Subsequent amendments to the Corporations Code broadly authorized so-called “interspecies mergers,” so that corporations, general partnerships (including limited liability partnerships), limited partnerships and limited liability companies, by complying with the statutory schemes applicable to each type of entity, now can merge directly with each other and with business trusts, real estate investment trusts and unincorporated associations.

The applicable statutes provide that if a disappearing entity in any such merger is domestic corporation or limited liability company, or a foreign corporation or limited liability company which has qualified to do business in California, or a registered limited liability partnership or a foreign limited liability partnership which is registered in California, the Secretary of State will not file documents effecting the merger until the filing on behalf of each such disappearing entity of a tax clearance certificate issued by the Franchise Tax Board. Practitioners often have been unable to consummate mergers on desired time schedules because of delays in securing the necessary tax clearances.

The legislature took a first step in dealing with these delays in SB284, which added Section 1107.5 to the Corporations Code, effective January 1, 2000. As originally enacted, Section 1107.5 provided that no tax clearance certificate would be necessary for a transaction in which the disappearing entity is a corporation organized within the prior 60 days and the surviving entity is a domestic corporation. It would seem this was useful primarily to facilitate acquisitions structured as three-cornered reverse mergers in which both the target and the “dummy” were California corporations. But SB 324, effective January 1, 2002, amended Section 1107.5 so that, at present, no tax clearance certificate is required if (a) the disappearing entity is any California corporation and (b) the surviving entity is either a California corporation or a foreign corporation qualified to do business in California.

The amendments and new sections proposed herein would dispense with the tax clearance certificate requirement otherwise applicable to a disappearing entity in a merger if the surviving entity in that merger is a domestic limited liability company or corporation, or a registered limited liability partnership, or a foreign limited liability company, limited liability partnership or corporation which is qualified to do business in California. By their terms, consistent with Section 1107.5 in its present form, they impose the franchise tax liabilities of those disappearing entities on surviving entities which themselves cannot be liquidated or merged out of existence unless clearance from the Franchise Tax Board is obtained.

APPLICATION:

If adopted, the proposed amendments would be effective January 1, 2006.

PENDING LITIGATION:

None to our knowledge.

LIKELY SUPPORT AND OPPOSITION:

There is not expected to be any opposition to these amendments.

FISCAL IMPACT:

There is not expected to be any material fiscal impact on the Secretary of State or any other governmental entity.

GERMANENESS:

Members of the Corporations Committee, the Nonprofit and Unincorporated Organizations Committee, and the Partnerships and Limited Liability Companies Committee, as attorneys regularly advising California business entities concerning possible mergers, believe that the proposed amendments would significantly facilitate certain transactions in which their clients may wish to engage. The sponsoring committees believe that the matter is germane under the current standards adopted by the Board of Governors of the State Bar of California because (1) the matter requires the special knowledge, training, experience or technical expertise of the Section and (2) the amendments will promote clarity, consistency and comprehensiveness in the law.